No. 17-1625

In the Supreme Court of the United States

RIMINI STREET, INC. AND SETH RAVIN,
Petitioners,

v.

ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF BSA | THE SOFTWARE ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

BSA | The Software Alliance is an association of the world's leading software and hardware technology companies. On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies. Because copyright policy is vitally important to promoting the innovation that has made the United States the world's leader in software development, BSA members have a strong stake in the proper functioning of the U.S. copyright system.[1]

BSA members are among the Nation's leading technology companies, producing much of the hardware and software that power computer and telecommunication networks. Due to the complexity and commercial success of their products, these companies are frequently the subject of copyright infringement claims. At the same time, by virtue of their software development activities, BSA members hold numerous copyrights that they enforce against infringers in appropriate circumstances. Because BSA members are both innovators as well as substantial copyright holders, and are both plaintiffs and defendants in infringement actions, they have a particularly acute interest in ensuring that the cost-shifting rules for copyright litigation are fair and promote sound copyright policy.

The members of BSA include Adobe, Akamai, ANSYS, Apple, Autodesk, Bentley Systems, Box, CA

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of *amicus* briefs with the Clerk's office.

Technologies, Cadence, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, MathWorks, Microsoft, Okta, Oracle, PTC, salesforce.com, SAS Institute, Siemens PLM Software, Slack, Splunk, Symantec, TrendMicro, Trimble Solutions Corporation, Twilio, and Workday.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Copyright Act provision governing awards of costs and attorneys' fees, 17 U.S.C. § 505, should be interpreted to "encourage the types of lawsuits that promote th[e] purposes" of the Copyright Act—which are "encouraging and rewarding authors' creations while also enabling others to build on that work." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016).

Amicus and its members—leading companies in the U.S. software industry—recognize the importance of both of these goals. If software creators fear that they will not be able to afford to bring infringement litigation when their copyrights are infringed, they will be deterred from making the investments needed to create new software. And if companies fear that they will incur substantial costs in defending against abusive infringement claims, they will be chilled from building upon others' copyrighted software in the manner permitted by fair use and other copyright principles—thereby frustrating innovation.

The reading of Section 505 that best promotes both goals of the Copyright Act—encouraging meritorious infringement lawsuits while discouraging abusive claims—is that district courts have discretion in appropriate cases to award to prevailing parties *all*

costs of litigation, including generally nontaxable costs.

Litigating a copyright suit to judgment imposes significant costs on both plaintiffs and defendants. Shifting all of those costs where appropriate is necessary to ensure that both plaintiffs and defendants with meritorious positions will be incentivized to press to a decision on the merits, and are not forced to abandon meritorious claims or defenses due to cost pressures.

This reading of Section 505 is also the one compelled by principles of statutory interpretation. Congress adopted the "full costs" language in the Copyright Act of 1831 as a departure from other statutes that allowed for "single costs" or expressly incorporated state law. Although Congress has since adopted a narrower definition of the costs that are taxable by default in federal court (see 28 U.S.C. § 1920), it has left the statutory provision for award of "full costs" unchanged in every successive version of the Copyright Act. That text should therefore be interpreted to mean what Congress originally intended—permitting a district court to award to the prevailing party all costs of the litigation, including otherwise nontaxable costs.

ARGUMENT

Costs Not Taxable Under 28 U.S.C. § 1920 Are Recoverable Under The Copyright Act.

This Court should affirm the decision below and hold that Section 505 confers upon district courts the discretion, in appropriate cases, to award to prevailing parties otherwise-nontaxable costs. Congress intended that such costs be awardable to prevailing copyright litigants, and shifting these costs when war-

ranted is necessary to enable both victims of infringement and noninfringing innovators to vindicate their rights under the Copyright Act.

A. Appropriate Enforcement Of Software Copyrights Is Important To The U.S. Economy.

1. Software innovations fuel the nation's economic growth.

Software is a key driver—if not *the* driver—of the U.S. economy today. The software industry contributes more than one trillion dollars to the U.S. economy every year. BSA, *The $1 Trillion Economic Impact of Software* 3 (June 2016), perma.cc/L28J-D8X5. That number includes $475.3 billion in direct GDP contributions and over $525 billion in indirect and induced contributions attributable to the software industry. *Ibid.*

Software innovations play an especially important role in increasing American economic productivity. "[A]ging economies," like the United States', "depend on productivity gains to drive economic growth." See, *e.g.*, McKinsey Global Inst., *Solving the Productivity Puzzle: The Role of Demand and the Promise of Digitization* 1 (Feb. 2018), perma.cc/A3W5-7F2R. And software is a key contributor to American productivity gains in virtually every industry sector. *Id.* at 7. Indeed, software has enabled enormous breakthroughs in a range of fields, from transportation and logistics, to medicine, to agriculture, to cloud computing. *The $1 Trillion Economic Impact of Software*, *supra*, at 6-9.

The software industry also contributes to economic growth through its significant investments in research and development ("R&D"). Companies have responded to "the supercharged pace of improvement

in what software can do" by "strengthen[ing] their software and service offerings," and this "rapid change is powerfully affecting the mix of R&D spending." Barry Jaruzelski et al., PwC, *Software-as-a-Catalyst*, strategy+business (Oct. 25, 2016), perma.cc/8SAH-WDTX. Software is the fastest growing category of R&D spending in the entire economy (*ibid.*), and now accounts for more than $50 billion of R&D spending per year. *The $1 Trillion Economic Impact of Software*, *supra*, at 4.

Finally, the software industry supports nearly 10 million American jobs. *The $1 Trillion Economic Impact of Software*, *supra*, at 3. Of those jobs, 2.5 million are created directly by the software industry. These are high-quality, high-paying jobs: Software developers earned an average of $108,760 in 2014—more than twice the average annual wage for all U.S. occupations. *Id.* at 1. And the industry's growth is expected to create even more of these jobs in the coming years: the Department of Labor projects that, as a result of "increased demand for computer software," "[e]mployment of software developers is projected to grow 24 percent from 2016 to 2026, much faster than the average for all occupations." Bureau of Lab. Stat., *Occupational Outlook Handbook: Software Developers*, perma.cc/77VA-2MHQ.

2. Software R&D relies on copyright protection.

Companies' ability to continue investing these huge sums in software development—and, therefore, the continued growth of the software industry's contribution to the economy—depends on appropriate, balanced judicial enforcement of copyright law.

Intellectual property protection is especially important to the software industry. "Software fundamentally differs from more traditional forms of medium, such as print or phonographic materials, in that software can be both[] more readily and easily copied on a mass scale in an extraordinarily short amount of time and relatively inexpensively." *Wall Data Inc.* v. *L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 781 (9th Cir. 2006) (internal quotation marks omitted). Indeed, the ease and speed with which software can be copied "make[] it extraordinarily vulnerable to illegal copying and piracy." *Ibid.* (internal quotation marks omitted). Thus, absent legal protection against unauthorized copying and use, software developers would be unable to recoup the costs of their investment in their software.

At the same time, software creators must have appropriate breathing room to borrow from prior software developments in lawful, noninfringing ways. Developers frequently reuse pieces of others' software or code in new software that builds on those elements, and copyright law authorizes such conduct through the fair use defense. See, *e.g.*, Clark D. Asay, *Transformative Use in Software*, 70 Stan. L. Rev. Online 9, 19 (2017) ("Software reuse is an important means by which to spur robust software innovation. Copyright law's fair use defense is one important means of enabling such reuse."). Copyright law should encourage this innovative conduct, which yields tremendous economic benefits when undertaken lawfully.

B. Balanced Copyright Enforcement Requires District Court Discretion To Award Prevailing Copyright Litigants All Of Their Costs, Not Just Generally-Taxable Costs.

The copyright system can properly balance these competing goals only if district courts are able, in appropriate cases, to make prevailing litigants whole for *all* costs associated with litigation—not just the subset of "taxable costs" enumerated in 28 U.S.C. § 1920. Without the availability of such relief, many copyright litigants will face the prospect of substantial financial loss even if they prevail in litigation—which opens the door to gamesmanship and abuse in the litigation system.

Copyright infringement litigation is an especially costly form of litigation for both sides of a case. As of 2013, the average cost of litigating a copyright case through trial ranged "from $384,000 to over $2 million, for both plaintiffs and defendants." Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277, 2288 (2013). And copyright cases are especially likely to go to trial given the "necessarily fact-intensive nature" of the issues, including whether copying occurred, whether two works are "'substantially similar,'" and whether a use qualified as a fair use. *Id.* at 2289.

These high costs burden both plaintiffs and defendants. "Copyright owners whose works are infringed often are deterred from enforcing their rights due to the burden and expense of pursuing litigation in the federal system." U.S. Copyright Office, *Copyright Small Claims: A Report of the Register of Copyrights* 24, 97 (Sept. 2013), perma.cc/8VLG-BFRJ. A

determined defendant can threaten to draw out litigation and thus frustrate a plaintiff's legitimate infringement claim.

High costs are also a threat to copyright defendants, because they "discourage defendants from contesting palpably frivolous and overbroad infringement claims by copyright owners." Balganesh, 113 Colum. L. Rev. at 2291. Faced with the high cost of litigating a copyright claim to judgment (and of proving fair use, which is an affirmative defense (see *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994))), a defendant that has engaged in lawful, non-infringing innovation may agree to pay an unjustified settlement rather than defending its conduct through summary judgment and trial.

Although the Copyright Act unquestionably allows prevailing parties to recover generally-taxable costs and attorneys' fees, shifting those costs alone often may not be sufficient to alleviate the problem of high costs in copyright litigation. Indeed, as this case illustrates, precluding the recovery of nontaxable costs would leave many prevailing copyright litigants uncompensated for a significant portion of litigation expenses.

Here, respondents were awarded $12.7 million in nontaxable costs, as opposed to only $3.4 million in taxable costs. Pet. App. 33a-34a. And the nontaxable costs awarded were 25% less than respondents had sought (*id.* at 71a)—indicating that respondents' actual nontaxable costs were even higher. Allowing district courts to award prevailing parties *all* of their litigation costs—including generally-nontaxable costs—is therefore necessary to ensure that victims of in-

fringement can be made whole and that innocent defendants have proper incentives to resist and defeat unjustified infringement lawsuits.

Making nontaxable costs available would not open the door to massive awards in every case. Rather, the amount of costs to be awarded in a particular case would be committed to district courts' discretion, as Section 505 directs. See 17 U.S.C. § 505 ("[T]he court *in its discretion* may allow the recovery of full costs by or against any party.") (emphasis added). In exercising this discretion, district courts—like the district court here (Pet. App. 60a)—are properly guided by the standard this Court outlined for attorneys' fee claims under Section 505 in *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994), and *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016).

That approach, as *Kirtsaeng* clarified, gives "substantial weight" to the objective reasonableness of the losing party's litigation position (136 S. Ct. at 1986), but also looks to a number of other "nonexclusive factors," including "frivolousness, motivation, * * * and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty*, 510 U.S. at 534 n.19 (internal quotation marks omitted). This multi-factor approach allows district courts to award a prevailing party all of its litigation costs when the circumstances warrant, while giving courts flexibility to award reduced costs (or no costs) in less egregious cases.

Petitioners object that permitting awards of nontaxable costs would create administrability problems and lead to "significant post-trial litigation." Pet. Br. 46. But that concern is misplaced. What qualifies as a "taxable cost" under Section 1920 in any given case is already subject to debate. See, *e.g.*, *Marmo* v. *Tyson*

Fresh Meats, Inc., 457 F.3d 748, 763 (8th Cir. 2006) (district court did not abuse discretion in refusing to tax costs related to witnesses who were withdrawn by plaintiff or ruled inadmissible); *Denton* v. *DaimlerChrysler Corp.*, 645 F. Supp. 2d 1215, 1227 (N.D. Ga. 2009) (concluding that "shipping and handling charges and the costs of obtaining exhibits" for depositions were recoverable costs under Section 1920(2) but that "incidental expenses associated with depositions," such as CD-ROMs, rough transcripts, etc., were not recoverable).

Similarly, "legal battles over attorneys' fees" can often require "another round of protracted litigation" to resolve. See *S-1 By and Through P-1* v. *State Bd. of Educ. of N.C.*, 6 F.3d 160, 171 (4th Cir. 1993) (Wilkinson, J., dissenting), *adopted by* 21 F.3d 49, 52 (4th Cir. 1994) (en banc). And parties can seek to have courts award nontaxable costs pursuant to their inherent authority—which would lead to additional litigation. See Resp. Br. 52.

Cost awards require nothing more than a straightforward exercise of the district court's discretion, informed by the same equitable analysis that a district court already will be applying to the prevailing party's attorneys' fee request. For that reason, allowing awards of generally-nontaxable costs would not add any meaningful additional litigation burden.

C. Section 505's Provision For "Full Costs" Includes Authority To Award Otherwise-Nontaxable Costs.

Awarding nontaxable costs to prevailing copyright litigants is not only the proper approach as a matter of policy—it is the approach that best comports with

the text of Section 505 and the context in which the provision was originally enacted.

1. The statutory term "full costs" means an award of all litigation expenses, in accordance with prevailing practice at the time of its enactment.

Section 505 is distinctive in its use of the phrase "full costs"; most of the cost-shifting provisions in the U.S. Code refer only to "costs," either alone or in conjunction with other terms (Pet. Br. 24 n.1).

This intentional choice of words is crucial to resolving the question presented. As this Court has often stated, "when Congress enacts a statute that uses different language from a prior statute, we normally presume that Congress did so to convey a different meaning." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1578 (2016). Thus, Section 505 should be read in light of its particular language, which authorizes the award of a broader range of litigation costs than those available under other statutes that refer simply to "costs."

The history of the language "full costs" confirms that Congress intended the term to encompass more than the costs now identified as taxable under Section 1920. At the time Congress enacted the Copyright Act of 1831, there was no generally applicable federal statute governing cost-shifting in federal court. Instead, Congress had enacted statutes that expressly incorporated state law, or otherwise limited which costs were recoverable. Resp. Br. 37. The 1831 Act, by contrast, broadly provided that "in all recoveries under this act, either for damages, forfeitures, or penalties, full costs shall be allowed thereon, any thing in

any former act to the contrary notwithstanding." Copyright Act of 1831, ch. 16, § 12, 4 Stat. 436, 438-39.

In 1853, Congress passed the Fee Act, which provided that "in lieu of the compensation now allowed by law," only certain fixed categories of costs would be taxable by federal courts. Fee Act of 1853, ch. 80, 10 Stat. 161, 161. But that law did not disturb the broad, preexisting language of the 1831 Copyright Act, and Congress has not done so since.

Congress's preservation of the 1831 Act's language is a strong indicator that it intended to preserve the 1831 Act's broad provision for award of *all* costs. See, *e.g.*, *Kappos* v. *Hyatt*, 566 U.S. 431, 440-41 (2012) (holding that because the "core language" of a statute later incorporated into the Patent Act "remains largely unchanged," the predecessor statute "and the judicial decisions interpreting that statute should inform our understanding of" the current statute).[2]

2. Petitioners' reading of this Court's precedents is wrong.

Petitioners' argument that "full costs" under Section 505 are limited to taxable costs under Section

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[2] The United States observes that the States in 1831 regulated the amounts of costs that could be recovered and their rates, and asserts that, in providing for "full costs," "Congress signaled that costs in copyright suits should be taxed at the listed state-law rates—no more and no less." U.S. Br. 21. But that ignores the fact that Congress chose to incorporate state law explicitly when it wished to do so—and it did not do so in the 1831 Copyright Act. See, *e.g.*, Act of Mar. 1, 1793, ch. 20, § 4, 1 Stat. 332, 333. The 1831 Congress's determination that the "full" amount of such costs should be recoverable, a determination that has never been overturned, supports a broad construction of Section 505.

1920 rests on a flawed reading of this Court's precedents.

In petitioners' view, those precedents impose a rigid, three-category structure for litigation-related expenses: "costs," which means only the costs taxable under Section 1920; "fees," meaning amounts charged by attorneys and other professionals; and "expenses," a catchall for other types of expenditures. Pet. Br. 20. Petitioners contend that the term "costs" never refers to any expenditures other than the taxable costs enumerated in Section 1920 and, as a result, a statute using the term "costs" presumptively does not authorize awarding any other kind of costs unless—and only to the extent that—it also refers to "fees" or "expenses." *Id.* at 25.

Petitioners' approach is an incorrect oversimplification. There is no ironclad rule that applies to every instance of fee-shifting language in the U.S. Code because Congress itself does not consistently employ the three terms in petitioners' rigid structure. In some instances, it speaks of "costs" as separate from "fees" or "expenses." See, *e.g.*, 11 U.S.C. § 363(n) (referring to "any costs, attorneys' fees, or expenses incurred"); 15 U.S.C. § 2618(d) (referring to "costs of suit and reasonable fees for attorneys and expert witnesses"). But in other instances, Congress speaks of "costs" or "expenses" as *including* "fees." See, *e.g.*, 15 U.S.C. § 2087(b)(7)(B) ("costs of litigation (including reasonable attorneys' and expert witness fees)"); 30 U.S.C. § 938(c) ("all costs and expenses (including the attorney's fees)"); 42 U.S.C. § 247d-6d(e)(9) ("reasonable expenses * * * including a reasonable attorney's fee").

In sum, there is no one definition of "costs" that applies in every situation; rather, the question

whether a statute authorizes awarding generally-nontaxable costs must be determined on the basis of each statute's particular text and context. Here, for the reasons explained above, that context demonstrates that Congress's intent, when it adopted the language now found in Section 505, was to provide for awards of *all* kinds of litigation costs.[3]

Petitioners also invoke a trio of this Court's precedents—but none offers support for their position that "full costs" excludes nontaxable costs.

First, in *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), the Court held that prevailing defendants in antitrust actions could not obtain expert witness fees beyond the limited reimbursement authorized by Section 1920. The district court in that case had awarded expert witness fees in excess of those available under Section 1920, purporting to act pursuant to its discretion under Rule 54(d). *Id.* at 439. This Court rejected this use of Rule 54(d), holding that "[Section] 1920 defines the term 'costs' as used in Rule 54(d)." *Id.* at 441.

Crawford Fitting thus established that in cases in which Rule 54(d) and Section 1920 govern awards of costs, the taxable costs enumerated in Section 1920 are the only costs that a court may award. But the Court did not hold that Section 1920 precludes awards of other types of costs in cases governed by a statute whose text and context departs from Rule 54(b) and

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[3] That conclusion is corroborated by the fact that four other federal statutory provisions, all of which were enacted after 1976, also use the phrase "full costs"—and as respondents note, the legislative history of one of these provisions indicates that Congress understood the term to include more than the costs that are taxable under Section 1920. Resp. Br. 7.

Section 1920. To the contrary, the Court acknowledged that its default rule could be displaced by "explicit statutory or contractual authorization." 482 U.S. at 445. That is precisely the circumstance here.

Next, in *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83 (1991), the Court considered whether 42 U.S.C. § 1988—which at the time authorized "a reasonable attorney's fee"—also allowed for awards of expert witness fees. The Court held that it did not, concluding based on statutory and judicial usage that the term "attorney's fee" was not ordinarily used to refer to expert witness fees and thus did not give "explicit statutory authority" to award expert fees. That unremarkable proposition is the most that *Casey* can be read to hold—and it is irrelevant here, given that Section 505 entitles prevailing parties to "full costs," a term that at the time of its adoption meant *all* costs associated with litigation.

Finally, in *Arlington Central School District Board of Education* v. *Murphy*, the Court held that expert witness fees could not be recovered under the Individuals with Disabilities Education Act ("IDEA"), which provided that a court could award "reasonable attorneys' fees as part of the costs." 548 U.S. 291, 293 (2006) (internal quotation marks omitted). The Court's decision in *Murphy* turned on essentially the same reasoning as *Casey*: indeed, *Murphy* noted that, in order to award expert witness fees to the plaintiffs, the Court would have had to "hold that the relevant language in the IDEA * * * exactly the opposite of what the nearly identical language in 42 U.S.C. § 1988 was held to mean in *Casey*." *Id.* at 302. Thus, *Murphy* is inapposite here for the same reasons as *Casey*.

To be sure, *Murphy* referred to "the principle, recognized in *Crawford Fitting*, that no statute will be

construed as authorizing the taxation of witness fees as costs unless the statute 'refer[s] explicitly to witness fees.'" 548 U.S. at 301 (quoting *Crawford Fitting*, 482 U.S. at 445). But to the extent that *Crawford Fitting* recognized such a "principle," it was one that looked forward from the enactment of Section 1920: the *Crawford* Court was loath to "infer that Congress has repealed §§ 1920 and 1821" through a statute "not referring explicitly to witness fees." 482 U.S. at 445. Such a forward-looking rule makes perfect sense—for legislation enacted after Section 1920, it is logical to understand Congress to have departed from Section 1920's taxable cost baseline only where it said it was doing so.

But the relevant language of Section 505 of the Copyright Act long predates Section 1920—indeed, as noted above, that language predates even the original Fee Act. Congress's clear intent in the 1831 Act to provide for full shifting of litigation costs should not be abrogated based on an interpretive rule grounded in a statute (Section 1920) that was enacted more than one hundred years later.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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